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Authored by William T. McCaffery, Esq., a 21 year industry professional and partner in one of New York's leading professional liability defense firms, the updated 2018 "New York Legal Malpractice" provides claims professionals with a complete guide to common issues that arise in handling legal malpractice claims in New York.

New York Legal Malpractice

A Claims Professional's Guide

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New York Legal Malpractice:
A Claims Professional's Guide

Contents

1. Attorneys' Liability to Others

1.1 Liability to Clients

Rule:
In order to prevail in a legal malpractice action, the plaintiff must establish the existence of an attorney-client relationship.

The existence of an attorney-client relationship does not require a formal retainer agreement or payment of a fee; there must be an explicit undertaking by the attorney to perform a specific task.

Authority:
"To recover damages for legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney-client relationship…Since an attorney-client relationship does not depend on the existence of a formal retainer agreement or upon payment of a fee (*see Hansen v. Caffry,* 280 A.D.2d 704, 720 N.Y.S.2d 258), a court must look to the words and actions of the parties to ascertain the existence of such a relationship (*see Tropp v. Lumer,* 23 A.D.3d 550, 806 N.Y.S.2d 599)." *Nelson v. Kalathara*, 48 A.D.3d 528, 529, 853 N.Y.S.2d 89, 90-91 (2d Dep't 2008).

"The unilateral belief of a plaintiff alone does not confer upon him or her the status of a client (*see Wei Cheng Chang v. Pi,* 288 A.D.2d 378, 380, 733 N.Y.S.2d 471; *Volpe v. Canfield, supra* at 283, 654 N.Y.S.2d 160; *Jane St. Co. v. Rosenberg & Estis, supra*)." *Moran v. Hurst*, 32 A.D.3d 909, 911, 822 N.Y.S.2d 564, 566 (2d Dep't 2006). *See also, Berry v. Utica National Insurance Group*, 66 A.D.3d 1376, 886 N.Y.S.2d 784, 785 (4th Dept 2009).

1.2 Liability to Third-Parties

Rule:
An attorney is liable for malpractice to a third-party/non-client only if there is "near-privity" with the third-party.

Authority:
"'Absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity or near-privity for harm caused by professional negligence' *Fredriksen v. Fredriksen*, 30 A.D.3d 370, 372, 817 N.Y.S.2d 320; *see AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 595, 808 N.Y.S.2d 573, 842 N.E.2d 471)." *DeMartino v. Golden*, 150 A.D.3d 1200, 1201, 52 N.Y.S.3d 892, 893 (2d Dep't 2017).

"It is well settled that attorneys may be liable for their negligence both to those with whom they have actual privity of contract and to those with whom the relationship is 'so close as to approach that of privity' (*Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood,* 80 N.Y.2d 377, 382, 590 N.Y.S.2d 831, 605 N.E.2d 318 [1992])." *Millennium Import, LLC v. Reed Smith LLP*, 104 A.D.3d 190, 194, 958 N.Y.S.2d 375, 378 (1st Dep't 2013).

1.2.1 Liability to Beneficiaries

Rule:
In New York, attorneys are not liable in legal malpractice to the beneficiaries or the intended beneficiaries of a decedent's will.

Authority:
"The plaintiffs' status as beneficiaries of [the] will, and their mere claim that they instructed the defendants to draft the instrument in accordance with the decedent's expressed intentions, fail to suggest the existence between the parties of the type of relationship necessary to sustain this action." *Conti v. Polizzotto*, 243 A.D.2d 672, 663 N.Y.S.2d 293, 294 (2d Dep't 1997).

"The Supreme Court properly granted those branches of the defendant's motion pursuant to CPLR 3211(a) which were to dismiss the causes of action asserted by the decedent's three daughters in their individual capacities for lack of standing. Lack of privity with an estate planning attorney is a bar against a beneficiary's claims of legal malpractice against that attorney absent fraud, collusion, malicious acts, or other special circumstances (*see Estate of Schneider v. Finmann*, 15 N.Y.3d 306, 310, 907 N.Y.S.2d 119, 933 N.E. 718), none of which are alleged in this case." *Rhodes v. Honigman*, 131 A.D.3d 1151, 1152, 16 N.Y.S.3d 324, 325 (2d Dep't 2015).

1.2.2 Liability to Executors and Trustees

Rule:
An attorney can be liable to the executor of an estate or to the trustee of a trust to the extent the legal malpractice diminished the value of the estate or trust.

Authority:
"We now hold that privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney." *Estate of Schneider v. Finmann*, 15 N.Y.3d 306, 309, 933 N.E.2d 718, 720, 907 N.Y.S.2d 119, 212 (2010).

"The Supreme Court properly denied that branch of the defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the amended complaint insofar as asserted by the trustee plaintiffs. As the court correctly found, the trustee plaintiffs stand in a position analogous to that of the personal representative of an estate, and therefore, possess the requisite privity, or a relationship sufficiently approaching privity, to maintain an action alleging legal malpractice against the defendant (*see generally Estate of Schneider v. Finmann*, 15 N.Y.3d 306, 907 N.Y.S.2d 119, 993 N.E.2d 718)." *Ianiro v. Bachman*, 131 A.D.3d 925, 926, 16 N.Y.S.3d 85, 86 (2d Dep't 2015).

1.2.3 Liability to Trustees in Bankruptcy

Rule:
Upon a party's bankruptcy, any legal malpractice claim possessed by that bankrupt party becomes property of the estate in bankruptcy and the malpractice claim can only be pursued by the trustee.

Authority:
"Whether the legal malpractice claim asserted in the complaint is viewed as having accrued prior to the filing of the bankruptcy petition, as the motion court held, or post-petition, as plaintiff contends, the claim is still the property of the bankrupt estate pursuant to the Bankruptcy Code (11 USC § 541 [a][1],[7]), and may not be maintained by plaintiff in his individual capacity (*In re Tomaiolo,* 205 B.R. 10; *see also In re C–Power Products,* 230 B.R. 800, 803; *In re Dow,* 132 B.R. 853, 859). Such a [cause of] action is exercisable only by the trustee in bankruptcy." *Williams v. Stein*, 6 A.D.3d 197, 198, 775 N.Y.S.2d 255 (1st Dep't 2004).

1.3 Liability to Assignees of Claims

Rule:
Legal malpractice claims are assignable.

Authority:
"Pursuant to General Obligations Law § 13–101, all claims are assignable except those expressly prohibited. Those claims expressly prohibited do not include a claim for legal malpractice [citations omitted]. Thus, on the facts presented, the assignment would be neither a violation of public policy [citations omitted] nor the assignment of a claim to recover damages for personal injuries (*see,* General Construction Law § 37–a). Therefore, the assignment of the claims at issue does not violate General Obligations Law § 13–101." *Greevy by Greevy v. Becker, Isserlis, Sullivan & Kurtz*, 240 A.D.2d 539, 541, 658 N.Y.S.2d 693, 694-695 (2d Dep't 1997).

2. Necessary Elements of a Legal Malpractice Claim

Rule:
There are three necessary elements for a plaintiff to prove a legal malpractice case in New York: (1) negligence, (2) proximate cause, and (3) damages.

Authority:
"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d 438, 442, 835 N.Y.S.2d 534, 867 N.E.2d 385 [internal quotation marks omitted]; *see Verdi v. Jacoby & Meyers, LLP,* 154 A.D.3d 901, 902, 63

N.Y.S.3d 71; *Ferrigno v Jaghab, Jaghab & Jaghab, P.C.*, 152 A.D.3d 650, 652, 59 N.Y.S.3d 115)." *Iannucci v. Kucker & Bruh, LLP*, 161 A.D.3d 959, 960, 77 N.Y.S.3d 118 (2d Dep't 2018) [internal quotation marks omitted].

2.1. Negligence

Rule:
Negligence in a legal malpractice action is when an attorney fails to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession.

Authority:
"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' [citation omitted]." *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442, 867 N.E.2d 385, 387, 835 N.Y.S.2d 534, 536 (2007).

2.2. Proximate Cause

2.2.1. "But For" Causation

Rule:
In order to establish the element of proximate cause, the plaintiff in a legal malpractice action must demonstrate that he/she would have prevailed or had a better result in the underlying matter "but for" the attorney's negligence.

Authority:
"'To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence' (*Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d at 442, 835 N.Y.S.2d 534, 867 N.E.2d 385; *see Burbige v. Siben & Ferber*, 152 A.D.3d 641, 642, 58 N.Y.S.3d 562)." *Betz v. Blatt*, 160 A.D.3d 696, 697, 74 N.Y.S.3d 75 (2d Dep't 2018).

"Proximate cause requires a showing that 'but for' the attorney's negligence, the plaintiff would either have been successful in the underlying matter or would not have sustained any ascertainable damages [citation omitted]." *Barbara King Family Trust v. Voluto Ventures LLC*, 46 A.D.3d 423, 424, 849 N.Y.S.2d 41 (1st Dep't 2007).

2.2.2. Litigation Malpractice: The "Case Within a Case"

Rule:
In order to establish the element of causation in a legal malpractice action arising from an underlying litigation, the plaintiff must prove "a case within a case." In the context of the legal malpractice case, the plaintiff must prove that he/she would have prevailed in the underlying litigation.

Authority:
"To establish a cause of action to recover damages for legal malpractice, a plaintiff must establish the elements of proximate cause and damages, i.e. a plaintiff must show that but for the attorney's negligence, he or she would have prevailed on the underlying claim by proving a case within a case." *Verdi v. Jacoby & Meyers, LLP*, 154 A.D.3d 901, 902, 63 N.Y.S.3d 71, 73 (2d Dep't 2017) [internal quotations and citations omitted].

"A plaintiff's burden of proof in a legal malpractice action is a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation (*Lindenman v. Kreitzer*, 7 A.D.3d 30, 34, 775 N.Y.S.2d 4 [2004]). In effect, a plaintiff in such an action must prove a case within a case. Only after the plaintiff establishes that he would have recovered a favorable judgment in the underlying action can he proceed with proof that the attorney engaged to represent him in the underlying action was negligent in handling that action and that the attorney's negligence was the proximate cause of the plaintiff's loss since it prevented him from being properly compensated for his loss (*id.*)." *Nazario v. Fortunato & Fortunato, PLLC*, 32 A.D.3d 692, 695-696, 822 N.Y.S.2d 236, 238 (1st Dep't 2006) [internal quotations omitted].

2.3. Damages

2.3.1. Measure of Damages

Rule:
Where the injury suffered is the loss of a cause of action, the measure of damages is generally the value of the claim lost.

Authority:
"Damages in a legal malpractice action are designed 'to make the injured client whole' [citation omitted]." *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 443, 867 N.E.2d 385, 388, 835 N.Y.S.2d 534, 537 (2007).

"The object of compensatory damages is to make the injured client whole. Where the injury suffered is the loss of a cause of action, the measure of damages is generally the value of the claim lost [citations omitted]." *Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 42, 555 N.E.2d 611, 556 N.Y.S.2d 239 (1990).

2.3.2. Need for Actual Damages

Rule:
Damages in a legal malpractice action must be real, actual, and ascertainable.

Authority:
"In a legal malpractice action, the damages resulting from an attorney's negligence must be 'actual and ascertainable' (*Zarin v. Reid & Priest, Esqs.*, 184 A.D.2d 385, 387-388, 585

N.Y.S.2d 379; *see also, Zeitlin v. Greenberg, Margolis, Ziegler, Schwartz, Dratch, Fishman, Franzblau & Falkin*, 209 A.D.2d 510, 619 N.Y.S.2d 289)." *DePinto v. Rosenthal & Curry*, 237 A.D.2d 482, 655 N.Y.S.2d 102, 103 (2d Dep't 1997).

2.3.3. Collectability Requirement

Rule:
The extent of a legal malpractice plaintiff's damages will depend on the extent to which he/she could have collected on a judgment if one had been obtained in the context of the underlying action.

Authority:
N.B.: New York Courts are split between whether collectability is a necessary element of a legal malpractice action that must be proven by the plaintiff or whether it is an affirmative defense that must be established by the defendant. The First Department holds that collectability is an affirmative defense, whereas the Second Department holds that collectability is plaintiff's burden to establish.

"To the extent that *Larson v Crucet* (105 AD2d 651 [1984]) holds that proof of the collectability of the underlying judgment is an essential element of the plaintiff's cause of action for legal malpractice, we overrule that decision." *Lindenman v. Kreitzer*, 7 A.D.3d 30, 35, 775 N.Y.S.2d 4 (1st Dep't 2004).

To the contrary:

"The Supreme Court correctly determined that the plaintiff in this action to recover damages for legal malpractice bore the burden of establishing that a hypothetical judgment in the underlying action would have been collectible against the third-party debtor [citations omitted]." *Jedlicka v. Field*, 14 A.D.3d 596,597, 787 N.Y.S.2d 888 (2d Dep't 2005).

2.3.4. Recoverability of Legal Fees

Rule:
Legal fees for the prosecution of the legal malpractice action are not recoverable, but legal fees incurred in an effort to correct the attorney's negligence in the underlying matter may be recoverable.

Authority:
"A plaintiff's damages may include 'litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct' [citation omitted]." *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 443, 867 N.E.2d 385, 388, 835 N.Y.S.2d 534, 537 (2007).

2.3.5. Contingent Fee Offset

Rule:
There is no reduction in damages in the context of a legal malpractice action for a contingency fee that would have been paid by the plaintiff in the context of the underlying case.

Authority:
"We conclude that a reduction of the client's recovery should not be allowed in this case and for reasons of public policy, we decline to apply the traditional rules of contract damages to permit a negligent attorney to obtain credit for an unearned fee." *Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 43, 555 N.E.2d 611, 556 N.Y.S.2d 239 (1990).

2.3.6. Pre-Judgment Interest

Rule:
In New York a plaintiff in a legal malpractice action is entitled to pre-judgment interest, which runs at 9% per year, from the date of the malpractice.

Authority:
"'CPLR 5001 operates to permit an award of prejudgment interest from the date of accrual of the malpractice action in actions seeking damages for attorney malpractice' [citations omitted]. In relevant part, CPLR 5001(b) provides: '[I]nterest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.'" *Barnett v. Schwartz*, 47 A.D.3d 197, 208, 848 N.Y.S.2d 663, 671 (2d Dep't 2007).

3. Alternative Causes of Action

Rule:
Alternative causes of action are permissible if they arise from different facts or seek damages different from the malpractice claim. However, alternative causes of action in a legal malpractice case are subject to dismissal if they arise from the same facts and seek the same damages as the legal malpractice cause of action.

Authority:
"[T]he Supreme Court properly denied that branch of the defendants' motion pursuant to CPLR 3211(a)(7) which was to dismiss the cause of action alleging fraud as duplicative of the legal malpractice cause of action. As alleged in the complaint, the fraud cause of action was based upon tortious conduct independent of the alleged malpractice, i.e., an alleged misrepresentation as to the eligibility of the defendant [] to practice law in the State of Florida, and the plaintiffs

alleged that damages flowed from this distinct conduct [citations omitted]. *Rupolo v. Fish*, 87 A.D.3d 684, 685-686, 928 N.Y.S.2d 596, 598 (2d Dep't 2011).

"The defendants' alternate ground for dismissal of the causes of action alleging fraud, that those claims were duplicative of the causes of action alleging legal malpractice is without merit. The evidence submitted by the defendants does not establish that the plaintiff sustained no other damages, separate and apart from those sought as a result of the alleged legal malpractice, as a result of the defendants' alleged fraudulent conduct. Where, as here, tortious conduct independent of the alleged malpractice is alleged, a motion to dismiss a cause of action as duplicative is properly denied. *Vermont Mut. Ins. Co. v. McCabe & Mack, LLP*, 105 A.D.3d 837, 840, 964 N.Y.S.2d 160, 163 (2d Dep't 2013) [internal citations omitted].

3.1. Negligence

Rule:
A cause of action for negligence asserted in addition to a cause of action for legal malpractice will generally be subject to dismissal as duplicative of the legal malpractice claim.

Authority:
"[T]he causes of action alleging breach of contract and negligence are duplicative of the legal malpractice cause of action, since they arise from the same facts as those underlying the legal malpractice cause of action, and do not allege distinct damages [citations omitted]. Accordingly, the Supreme Court should have granted that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the causes of action alleging breach of contract and negligence." *Prott v. Lewin & Baglio, LLP*, 150 A.D.3d 908, 910, 55 N.Y.S.3d 98, 100 (2d Dep't 2017).

3.2. Breach of Contract

Rule:
A cause of action for breach of contract asserted in addition to a cause of action for legal malpractice will generally be subject to dismissal as duplicative of the legal malpractice claim.

Authority:
"[T]he Supreme Court should have granted those branches of the defendant's motion which were to dismiss the second and third causes of action, which were, respectively, to recover damages for negligent misrepresentation and breach of contract, as duplicative of the legal malpractice cause of action. Those causes of action were duplicative of the legal malpractice cause of action because they arose from the same operative facts and did not seek distinct and different damages [citations omitted]." *Kliger-Weiss Infosystems, Inc. v. Ruskin Moscou Faltischek, P.C.*, 159 A.D.3d 683, 684-685, 73 N.Y.S.3d 205, 207 (2d Dep't 2018).

3.3. Breach of Fiduciary Duty

Rule:
A cause of action for breach of fiduciary duty asserted in addition to a cause of action for legal malpractice will generally be subject to dismissal as duplicative of the legal malpractice claim.

Authority:
"The claims for fraud and breach of fiduciary duty are duplicative of the legal malpractice claim, since they all arose from identical facts and allege the same damages [citation omitted]." *Barrett v. Goldstein*, 161 A.D.3d 472, 473, 76 N.Y.S.3d 148, 150 (1st Dep't 2018).

3.4. Fraud

Rule:
A separate cause of action for fraud may be viable if it arises from facts different from those that give rise to the legal malpractice cause of action or if it seeks damages that are different from the legal malpractice cause of action.

Authority:
"To properly plead a cause of action to recover damages for fraud, the plaintiff must allege that (1) the defendant made a false representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the plaintiff's reliance, (4) there was justifiable reliance on the part of the plaintiff, and (5) the plaintiff was injured by the reliance [citations omitted]." *Pace v. Raisman & Associates, Esqs., LLP*, 95 A.D.3d 1185, 1188-1189, 945 N.Y.S.2d 118, 121-122 (2d Dep't 2012).

But See:

"The fraud claims are duplicative of the legal malpractice claim, since they arise from the same facts as underlie that claim and involve no additional damages separate and distinct from those alleged in connection with the malpractice claim [citations omitted]." *Gourary v. Green*, 143 A.D.3d 580, 581-582, 39 N.Y.S.3d 447, 449-450 (1st Dep't 2016).

3.5. Aiding and Abetting

Rule:
Separate causes of action can be asserted for claims such as aiding and abetting a breach of fiduciary duty and aiding and abetting a fraud.

Authority:
"A cause of action for aiding and abetting breach of fiduciary duty merely 'requires a prima facie showing of a fiduciary duty owed to plaintiff,…a breach of that duty, and defendant's substantial assistance…in effecting the breach, together with resulting damages' [citations omitted]." *Yuko Ito v. Suzuki*, 57 A.D.3d 205, 869 N.Y.S.2d 28, 31 (1st Dep't 2008).

"In order to plead properly a claim for aiding and abetting fraud, the complaint must allege: '(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud' [citations omitted]." *Stanfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Insurance Company*, 64 A.D.3d 472, 476, 883 N.Y.S.2d 486, 490 (1st Dep't 2009).

3.6. Conspiracy

Rule:
New York does not recognize civil conspiracy to commit a tort as an independent cause of action absent an underlying actionable tort.

Authority:
"'New York does not recognize civil conspiracy to commit a tort…as an independent cause of action' [citations omitted]. However, 'a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme' [citations omitted]. 'The allegation of conspiracy carries no greater burden, but also no less, than to assert adequately common action for a common purpose by common agreement or understanding among a group, from which common responsibility derives. Therefore, under New York law, [i]n order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement. A bare conclusory allegation of conspiracy is usually held insufficient' [citation omitted]." *Blanco v. Polanco*, 116 A.D.3d 892, 986 N.Y.S.2d 151, 155 (2d Dep't 2014).

3.7. Conflict of Interest

Rule:
A claim of conflict of interest is an allegation of an ethical violation and an ethical violation or violation of a Rule of Professional Conduct alone does not give rise to a cause of action in legal malpractice.

Authority:
"With respect to the third counterclaim, we also note that even if a violation of the Code of Professional Responsibility had occurred, that, in itself, would not create a private right of action (*see Kantor v. Bernstein*, 225 A.D.2d 500, 501–502, 640 N.Y.S.2d 40 [1996]; *see also Shapiro v. McNeill*, 92 N.Y.2d 91, 97, 677 N.Y.S.2d 48, 699 N.E.2d 407 [1998])" *Arkin Kaplan LLP v. Jones*, 42 A.D.3d 362, 366, 840 N.Y.S.2d 48, 51-52 (1st Dep't 2007).

3.8. Emotional Distress/Mental Suffering

Rule:
No recovery for emotional distress or mental suffering/anguish is permitted in a legal malpractice action in New York.

Authority:
"A cause of action for legal malpractice does not afford recovery for any item of damages other than pecuniary loss so there can be no recovery for emotional or psychological injury [citation omitted]." *Wolkstein v. Morgenstern*, 275 A.D.2d 635, 637, 713 N.Y.S.2d 171 (1st Dep't 2000).

"The Supreme Court also properly granted that branch of the defendant's cross motion which was pursuant to CPLR 3211(a)(1) and (7) to dismiss the plaintiff's demand to recover damages for emotional distress, since damages in a legal malpractice action are limited to pecuniary loss (*see Dombrowski v. Bulson,* 19 N.Y.3d at 351, 948 N.Y.S.2d 208, 971 N.E.2d 338; *Guiles v. Simser*, 35 A.D.3d 1054, 1056, 826 N.Y.S.2d 484; *Wolkstein v. Morgenstern*, 275 A.D.2d 635, 637, 713 N.Y.S.2d 171)." *Gaskin v. Harris*, 98 A.D.3d 941, 943-944, 950 N.Y.S.2d 751, 753-754 (2d Dep't 2012).

3.9. Concealment of Malpractice

Rule:
There is no independent cause of action for concealing malpractice.

Authority:
"[T]here is no independent cause of action for 'concealing' malpractice." *Zarin v. Reid & Priest, Esqs.*, 184 A.D.2d 385, 387, 585 N.Y.SW.2d 379 (1st Dep't 1992).

3.10. Punitive Damages

Rule:
There is no independent cause of action for punitive damages, but punitive damages can be requested in the *ad damnum* clause of a complaint. In order to prevail on a claim for punitive damages, the plaintiff must be able to establish that the attorney's conduct was gross, wanton, willful, or of high moral culpability.

Authority:
"[T]he claim for punitive damages should have been stricken as insufficient as a matter of law. The plaintiffs failed to allege facts demonstrating that the defendants' conduct was so outrageous as to evidence a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations (*see, Walker v Sheldon*, 10 NY2d 401, 405)." *Zarin v. Reid & Priest, Esqs.*, 184 A.D.2d 385, 388, 585 N.Y.S.2d 379 (1st Dep't 1992).

"The plaintiffs also improperly sought punitive damages in a separate cause of action and failed to raise a triable issue of fact as to whether [defendant's] alleged conduct was so gross, wanton, or willful, or of such high moral culpability, as to warrant an award of punitive damages (*see Baxter v. Javier*, 109 A.D.3d 493, 970 N.Y.S.2d 567; *Financial Serv. Veh. Trust v.*

Saad, 72 A.D.3d 1019, 900 N.Y.S.2d 353). *LaTouche v. Terezakis*, 132 A.D.3d 956, 957, 19 N.Y.S.3d 531, 533 (2d Dep't 2015).

3.11. Judiciary Law § 487

Rule:
Judiciary Law § 487 permits the recovery of treble damages against an attorney under certain limited circumstances.

Authority:
Judiciary Law § 487:

> An attorney or counselor who:
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
> 2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

"The Judiciary Law § 487 claims were correctly dismissed, as the conduct alleged does not evince a chronic and/or extreme pattern of legal delinquency (*see Chowaiki & Co. Fine Art Ltd. v. Lacher*, 115 A.D.3d 600, 601, 982 N.Y.S.2d 474 [1st Dept.2014]). Additionally, plaintiff has not alleged any proximately caused damages or identified any damages sustained as a result of Brecher's alleged conflict of interest, which did not arise in the course of a judicial proceeding and thus is not actionable under the statute (*see Meimeteas v. Carter Ledyard & Milburn LLP*, 105 A.D.3d 643, 963 N.Y.S.2d 583 [1st Dept.2013])." *Freeman v. Brecher*, 155 A.D.3d 453, 454, 64 N.Y.S.3d 13, 15 (1st Dep't 2017).

"The defendants were also entitled to dismissal of the cause of action alleging a violation of Judiciary Law § 487, albeit on a ground different from that articulated by the Supreme Court. '[A]n injury to the plaintiff resulting from the alleged deceitful conduct of the defendant attorney is an essential element of a cause of action based on a violation' of Judiciary Law § 487 (*Rozen v. Russ & Russ, P.C.*, 76 A.D.3d 965, 968, 908 N.Y.S.2d 217). Thus, to state a cause of action alleging a violation of Judiciary Law § 487, the plaintiff must 'plead allegations from which damages attributable to the defendants' conduct might be reasonably inferred' (*Mizuno v. Nunberg*, 122 A.D.3d 594, 595, 996 N.Y.S.2d 301 [internal quotation marks and brackets omitted]; *see Gumarova v. Law Offs. of Paul A. Bornow, P.C.*, 129 A.D.3d 911, 912, 12 N.Y.S.3d 187; *Mizuno v. Barak*, 113 A.D.3d 825, 827, 980 N.Y.S.2d 473). Here, the plaintiff failed to plead that he suffered any damages as a result of Friedman's alleged misconduct." *Maroulis v. Friedman*, 153 A.D.3d 1250, 1252, 60 N.Y.S.3d 468, 470-471 (2d Dep't 2017).

3.12. Ethical Violation/Violation of Rule of Professional Conduct

Rule:
An ethical violation or violation of a Rule of Professional Conduct alone does not give rise to a cause of action in legal malpractice.

Authority:
"Standing alone, an ethical violation will not create a duty giving rise to a cause of action that would otherwise not exist at law (*Shapiro v. McNeill*, 92 N.Y.2d 91, 97, 677 N.Y.S.2d 48, 699 N.E.2d 407 [1998])." *Art Capital Group, LLC v. Neuhaus*, 70 A.D.3d 605, 606, 896 N.Y.S.2d 35, 37 (1st Dep't 2010).

"With respect to the third counterclaim, we also note that even if a violation of the Code of Professional Responsibility had occurred, that, in itself, would not create a private right of action (*see Kantor v. Bernstein*, 225 A.D.2d 500, 501–502, 640 N.Y.S.2d 40 [1996]; *see also Shapiro v. McNeill*, 92 N.Y.2d 91, 97, 677 N.Y.S.2d 48, 699 N.E.2d 407 [1998])." *Arkin Kaplan LLP v. Jones*, 42 A.D.3d 362, 366, 840 N.Y.S.2d 48, 51-52 (1st Dep't 2007).

4. Defenses

4.1. Statute of Limitations

Rule:
The statute of limitations to commence a legal malpractice action in New York is three years from the date of the malpractice. The statute can be tolled by the continuous representation doctrine.

Authority:
CPLR 214(6)
"The following actions must be commenced within three years…6. an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort…"

4.1.1. Accrual Date

Rule:
In New York a cause of action for legal malpractice accrues on the date of the malpractice.

Authority:

"An action to recover damages arising from legal malpractice must be commenced within three years after accrual [citations omitted]. The action accrues when the malpractice is committed [citations omitted]. Causes of action alleging legal malpractice which would otherwise be barred by the statute of limitations are timely if the doctrine of continuous

representation applies [citations omitted]." *Macaluso v. Del Col*, 95 A.D.3d 959, 960, 944 N.Y.S.2d 589, 590 (2d Dep't 2012).

4.1.2. Discovery Rule

Rule:
In New York a claim for legal malpractice accrues when the malpractice is committed not when it is discovered.

Authority:
"A legal malpractice claim accrues when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court. In most cases, this accrual time is measured from the day an actionable injury occurs, even if the aggrieved party is then ignorant of the wrong or injury. What is important is when the malpractice was committed, not when the client discovered it." *3rd & 6th, LLC v. Berg*, 149 A.D.3d 794, 795, 53 N.Y.S.3d 78, 80 (2d Dep't 2017) [internal citations and quotations omitted].

4.1.3. Continuous Representation Doctrine

Rule:
The statute of limitations for a legal malpractice action is tolled until the conclusion of the attorney's representation.

Authority:
"The three-year limitations period applicable to causes of action to recover damages for legal malpractice may be tolled by the continuous representation doctrine where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim. For the doctrine to apply, there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney. One of the predicates for the application of the doctrine is continuing trust and confidence in the relationship between the parties." *Beroza v. Sallah Law Firm, P.C.*, 126 A.D.3d 742, 743, 5 N.Y.S.3d 297, 298 (2d Dep't 2015) [internal citations and quotations omitted].

4.1.4. Tolling

4.1.4.1 Ongoing Litigation

Rule:
On-going litigation will only toll the statute of limitations if the attorney accused of the malpractice continues to represent the client in that matter (*i.e.*, Continuous Representation Doctrine); otherwise, the statute begins to run from the date of the malpractice.

Authority:
"The defendant met its prima facie burden by establishing that the statute of limitations expired on April 20, 2013, three years after the consents were executed by the plaintiff, the defendant, and new counsel. The defendant took no acts on behalf of the plaintiff in the actions after the consents were signed on April 20, 2010. The parties' execution of the consents on that date in all of the actions, including Action Nos. 1 and 2, demonstrated the end of the defendant's representation of the plaintiff and the parties' mutual understanding that any future legal representation in the actions would be undertaken by the plaintiff's new counsel (*see McCoy v. Feinman*, 99 N.Y.2d at 306, 755 N.Y.S.2d 693, 785 N.E.2d 714; *Landow v. Snow Becker Krauss, P.C.*, 111 A.D.3d at 796, 975 N.Y.S.2d 119). Therefore, the defendant met its prima facie burden of establishing that the three-year statute of limitations period for commencing a cause of action alleging legal malpractice had expired at the time the plaintiff commenced this action on May 10, 2013. *Alizio v. Ruskin Moscou Faltischek, P.C.*, 126 A.D.3d 733, 735-736, 5 N.Y.S.3d 252, 254 (2d Dep't 2015).

4.1.4.2 Fraudulent Concealment

Rule:
Under the doctrine of equitable estoppel, a defendant-attorney can be barred from asserting a statute of limitations defense (rare).

Authority:
"Equitable estoppel is an 'extraordinary remedy' [citation omitted] which will 'bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing...which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding' [citation omitted]. A plaintiff seeking to invoke this doctrine must demonstrate subsequent, specific actions by defendant which kept plaintiff from timely bringing suit [citations omitted]. Plaintiffs must show the element of justifiable reliance on defendant's deception, fraud, or misrepresentations that effectively prevented the former from bringing suit in a timely fashion [citations omitted]." *Flaherty v. Attie*, 24 Misc.2d 1207(A), 890 N.Y.S.2d 369 (Sup. Ct. Qns. Cty. 2009).

"[P]laintiff adequately pleaded facts which, if proven, would establish the existence of an equitable estoppel[] in this case." *Lytell v. Lorusso*, 74 A.D.3d 905, 907, 903 N.Y.S.2d 98, 101 (2d Dep't 2010).

N.B.:
"[T]here is no independent cause of action for 'concealing' malpractice." *Zarin v. Reid & Priest, Esqs.*, 184 A.D.2d 385, 387, 585 N.Y.SW.2d 379 (1st Dep't 1992).

4.2. Privity

Rule:
An attorney is not liable to a non-client for legal malpractice unless there is near-privity or fraud, collusion, or malicious acts.

Authority:
"Absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity or near-privity for harm caused by professional negligence [citations omitted]." *Gorbatov v. Tsirelman*, 155 A.D.3d 836, 840 65 N.Y.S.3d 71, 75 (2d Dep't 2017).

4.3. Standing

Rule:
A plaintiff does not have standing to maintain a legal malpractice action if he lacks privity with the attorney or if the damages sustained are not his.

Authority:
"[A]bsent an attorney-client relationship, a cause of action for legal malpractice cannot be stated." *Federal Ins. Co. v. North American Specialty Ins. Co.*, 47 A.D.3d 52, 59, 847 N.Y.S.2d 7, 12 (1st Dep't 2007).

"[N]otwithstanding plaintiff's status as a 95% shareholder of Usheco, a closely held subchapter S corporation, he lacked standing to sue in his own name for injuries to the corporation [citations omitted]. *Schaeffer v. Lipton*, 243 A.D.2d 969, 970, 663 N.Y.S.2d 392 (3d Dep't 1997).

"The failure of a party to disclose a cause of action as an asset in a prior bankruptcy proceeding, which the party knew or should have known existed at the time of that proceeding, deprives him or her of the legal capacity to sue subsequently on that cause of action." *Keegan v. Moriarty-Morris*, 153 A.D.3d 683, 684, 59 N.Y.S.3d 779, 780 (2d Dep't 2017) [internal citations and quotations omitted].

4.4. Professional Judgment Rule

Rule:
An attorney is not liable for legal malpractice simply because of an error in judgment.

Authority:
"Decisions regarding the evidentiary support for a motion or the legal theory of a case are commonly strategic decisions and a client's disagreement with its attorney's strategy does not support a malpractice claim, even if the strategy had its flaws. An attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt. Moreover, an attorney's selection of one among several

reasonable courses of action does not constitute malpractice." *Brookwood Companies, Inc. v. Alston & Bird LLP*, 146 A.D.3d 662, 667, 49 N.Y.S.3d 10, 15 (1st Dep't 2017) [internal citations and quotations omitted].

"While other options may have been available to defendants, their choice of one of several reasonable alternatives certainly does not amount to malpractice [citation omitted]." *Brook Plaza Opthalmology Associates, P.C. v. Fink, Weinberger, Fredman, Berman & Lowell, P.C.*, 173 A.D.2d 170, 171, 569 N.Y.S.2d 25 (1st Dep't 1991).

"Construing the third-party complaint liberally in favor of the third-party plaintiffs, it alleges no more than an error of judgment by [third-party defendant-attorney], which does not rise to the level of malpractice [citations omitted]." *Rosner v. Paley*, 65 N.Y.2d 736, 738, 481 N.E.2d 553, 492 N.Y.S.2d 13 (1985).

4.5. Subsequent Representation

Rule:
An attorney's representation cannot be deemed the proximate cause of a plaintiff's claimed damages if there was sufficient time for plaintiff or his/her subsequent attorney to protect plaintiff's interests.

Authority:
"Even were it not untimely, the malpractice claim should also be dismissed because the proximate cause of any damages sustained by plaintiff was not the alleged malpractice of defendant, but rather the intervening and superseding failure of plaintiff's successor attorney. This is the case where successor counsel had sufficient time and opportunity to adequately protect plaintiff's rights, but failed to do so." *Davis v. Cohen & Gresser, LLP*, 160 A.D.3d 484, 487, 74 N.Y.S.3d 534, 537 (1st Dep't 2018) [internal citations and quotations omitted].

"The motion court properly determined that plaintiff failed to state a cause of action for legal malpractice. The documentary evidence established that plaintiff's successor counsel had sufficient time and opportunity to adequately protect plaintiff's rights…Accordingly, defendants' alleged negligence cannot be considered a proximate cause of plaintiff's alleged injury [citation omitted]." *Maksimiak v. Schwartzapfel Novick Truhowsky Marcus, P.C.*, 82 A.D.3d 652, 919 N.Y.S.2d 330 (1st Dep't 2011).

4.6. Speculative Damages

Rule:
Damages sought in a legal malpractice action must be actual and ascertainable and cannot be speculative.

Authority:
"The damages claimed in a legal malpractice action must be actual and ascertainable." *Oot v. Arno*, 275 A.D.2d 1023, 713 N.Y.S.2d 382, 383 (4th Dep't 2000) [internal citations and quotations omitted].

"[S]peculative damages cannot be a basis for legal malpractice (*Levine v. Lacher & Lovell–Taylor*, 256 A.D.2d 147, 681 N.Y.S.2d 503; *Price v. Herstic*, 240 A.D.2d 151, 657 N.Y.S.2d 700). Conclusory allegations of damages also are insufficient (*Lauer v. Rapp*, 190 A.D.2d 778, 593 N.Y.S.2d 843)." *Pellegrino v. File*, 291 A.D.2d 60, 63, 738 N.Y.S.2d 320, 323 (1st Dep't 2002).

4.7. Speculation on Future Events

Rule:
Speculation on future events is insufficient to establish an attorney's malpractice.

Authority:
"Plaintiff nonetheless asserts that a number of events which occurred after she severed her relationship with MSI could have been prevented if the law firm made the motion for the injunction. However, speculation on future events are insufficient to establish that the defendant lawyer's malpractice, if any, was a proximate cause of any such loss (*see D.D. Hamilton Textiles v. Estate of Mate, supra; Phillips–Smith v. Parker Chapin, supra; Sherwood Group v. Dornbush, Mensch, Mandelstam & Silverman*, 191 A.D.2d 292, 294, 594 N.Y.S.2d 766 [1993] [hypothetical course of events on which any determination of damages would have to be based constitutes such a chain of 'gross speculations on future events' as to be incapable of legal proof]; *Tilden, Ltd. v. Profeta & Eisenstein*, 236 A.D.2d 292, 292–293, 654 N.Y.S.2d 10 [1997] [legal malpractice action based on theory of what Court of Appeals would have done had plaintiff's attorney timely served motion for leave to appeal was 'too speculative to raise a genuine issue of fact with respect to proximate cause']])." *Brooks v. Lewin*, 21 A.D.3d 731, 734-735, 800 N.Y.S.2d 695, 698 (1st Dep't 2005).

4.8. Collectability

Rule:
The extent of a legal malpractice plaintiff's damages will depend on the extent to which he/she could have collected on a judgment if one had been obtained in the context of the underlying action.

Authority:
N.B.: New York Courts are split between whether collectability is a necessary element of a legal malpractice action that must be proven by the plaintiff or whether it is an affirmative defense that must be established by the defendant. The First Department holds that collectability is an affirmative defense, whereas the Second Department holds that collectability is plaintiff's burden to establish.

"To the extent that *Larson v Crucet* (105 AD2d 651 [1984]) holds that proof of the collectability of the underlying judgment is an essential element of the plaintiff's cause of action for legal malpractice, we overrule that decision." *Lindenman v. Kreitzer*, 7 A.D.3d 30, 35, 775 N.Y.S.2d 4 (1st Dep't 2004).

To the contrary:

"The Supreme Court correctly determined that the plaintiff in this action to recover damages for legal malpractice bore the burden of establishing that a hypothetical judgment in the underlying action would have been collectible against the third-party debtor [citations omitted]." *Jedlicka v. Field*, 14 A.D.3d 596,597, 787 N.Y.S.2d 888 (2d Dep't 2005). *See also*, *Quantum Corporate Funding, Ltd. v. Ellis*, 126 A.D.3d 866, 870, 6 N.Y.S.3d 255, 259 (2d Dep't 2015).

4.9. *Res Judicata*/Claim Preclusion

Rule:
A legal malpractice action is subject to dismissal if the attorney has previously prevailed against the client on an action to recover his/her legal fee.

Authority:
"Under New York State law, a determination fixing a defendant's fees in a prior action brought by the defendant against the plaintiff for fees for the same legal services which the plaintiff alleges were negligently performed, necessarily determines that there was no legal malpractice. The determination awarding fees bars the claim sounding in legal malpractice pursuant to both the doctrine of res judicata and the doctrine of collateral estoppel." *Breslin Realty Dev. Corp. v. Shaw*, 72 A.D.3d 258, 263-264, 893 N.Y.S.2d 95, 100 (2d Dep't 2010) [internal citations and quotations omitted].

4.10. Collateral Estoppel/Issue Preclusion (and Innocence Requirement in Criminal Matters)

Rule:
A legal malpractice action is subject to dismissal if the ultimate issue in the case has previously been determined against the plaintiff.

A plaintiff cannot state a claim for legal malpractice arising from representation in a criminal matter unless and until the criminal conviction is vacated.

Authority
"To prevail in this legal malpractice action, plaintiff would have to show that but for defendant's negligence he would have obtained a better result in the underlying accounting action [citation omitted]. To make that showing, plaintiff would have to litigate the issues of which cases belonged to the alleged partnership between himself and the underlying plaintiff and the fees to which he was entitled. However, those issues were raised and decided against

plaintiff in the underlying action [citation omitted], where he had a full and fair opportunity to litigate them, and he is precluded by the doctrine of collateral estoppel from re-litigating them in this action [citation omitted]." *Hirsch v. Fink*, 89 A.D.3d 430,431, 931 N.Y.S.2d 866, 867 (1st Dep't 2011).

"[P]laintiffs are precluded by the doctrine of collateral estoppel from litigating the issue of whether the landlord's failure to give them the certificate damaged them, as that issue was raised and decided against plaintiff Eighth Avenue Garage Corporation in a prior proceeding [citations omitted]." *Eighth Ave. Garage Corp. v. Kaye Scholer LLP*, 93 A.D.3d 611, 612, 941 N.Y.S.2d 110, 110-111 (1st Dep't 2012).

"Contrary to the plaintiff's contention, he failed to state a cause of action to recover damages for legal malpractice against the defendant for the defendant's representation of him in a criminal action because, to date, he has not successfully challenged his criminal conviction and, thus, can neither assert nor establish his innocence [citations omitted]. Although an appeal from the Supreme Court's denial of a motion brought by the plaintiff pursuant to CPL article 440 is currently pending before this Court, the plaintiff will not have a cause of action to recover damages for legal malpractice against his former criminal defense attorney unless he ultimately succeeds in his attempts to have the underlying conviction vacated and the indictment dismissed [citations omitted]." *Daly v. Peace*, 54 A.D.3d 801, 863 N.Y.S.2d 770 (2d Dep't 2008).

"A plea of guilty bars recovery for legal malpractice, regardless of the plaintiff's subjective reasons for pleading guilty." *Sgambelluri v. Ironman*, 78 A.D.3d 924, 911 N.Y.S.2d 427, (2d Dep't 2010) [internal citations and quotations omitted].

4.11. Effect of Prior Settlement

Rule:
Plaintiff can maintain a legal malpractice action despite the settlement of an underlying action if the underlying settlement was diminished due to the attorney's negligence.

Authority:
"A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel [internal quotation and citations omitted]." *Tortura v. Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 A.D.3d 1082, 1083, 803 N.Y.S.2d 571 (2d Dep't 2005); *see also, Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP v. Wilson*, 136 A.D.3d 1326, 1328, 25 N.Y.S.3d 468, 471 (4th Dep't 2016).

4.12. Prematurity

Rule:
A legal malpractice action can be stayed where the plaintiff's ultimate damages are not yet known because the underlying matter remains pending.

Authority:
"Since the client's remedies in the bankruptcy proceeding are uncertain, and since the client can have no cause of action for legal malpractice unless he would have had a remedy in the bankruptcy proceeding but for the attorney's negligence [citation omitted], we modify to stay the instant action until such time as the client's rights in the bankruptcy proceeding, and his contingent right to prosecute the underlying action, are finally settled." *Stettner v. Bendet*, 227 A.D.2d 202, 203, 642 N.Y.S.2d 253 (1st Dep't 1996).

"[S]ince some or all of the components of the damages alleged by the plaintiff may ultimately be addressed in the divorce action, the Supreme Court improvidently exercised its discretion in denying the plaintiff's cross motion for a stay of all proceedings pending the resolution of that action [citations omitted]." *Corrado v. Rubine*, 25 A.D.3d 748, 749, 807 N.Y.S.2d 878, 879 (2d Dep't 2006).

4.13. Redundant/Duplicative Claims

Rule:
Causes of action asserted by a plaintiff in addition to a legal malpractice cause of action are subject to dismissal if they arise from the same facts and seek the same damages as the legal malpractice cause of action.

Authority:
"The Supreme Court properly determined that the causes of action alleging breach of contract and negligent supervision were subject to dismissal. The defendants established that these causes of action arise from the same facts as the causes of action alleging legal malpractice and do not allege distinct damages. Thus, they are duplicative of the causes of action alleging legal malpractice [citations omitted]." *Vermont Mut. Ins. Co. v. McCabe & Mack, LLP*, 105 A.D.3d 837, 839, 964 N.Y.S.2d 160, 163 (2d Dep't 2013).

5. Procedural Matters

5.1. No Certificate/Affidavit of Merit Requirement

Rule:
No Certificate of Merit is required in order for a plaintiff to commence a legal malpractice action in New York.

Authority:
CPLR 3012-a: Certificate of Merit requirement is limited to medical, dental and podiatric malpractice actions.

5.2. Burdens of Proof

Rule:
Plaintiff has the burden of proof to establish the necessary elements of a legal malpractice claim. Defendant has the burden of proof on a motion for summary judgment.

Authority:
"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence. For a defendant in a legal malpractice action to succeed on a motion for summary judgment, evidence must be submitted in admissible form establishing that the plaintiff is unable to prove at least one of these essential elements." *Seidman v. Einig & Bush, LLP*, 151 A.D.3d 1095, 1095-1096, 59 N.Y.S.3d 44, 45 (2d Dep't 2017) [internal citations and quotations omitted].

5.3. Expert Testimony Requirement

Rule:
Expert testimony is generally required in order to establish an attorney's negligence.

Authority:
"Expert testimony is normally needed to establish that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, 'unless the ordinary experience of the fact-finder provides sufficient basis for judging the adequacy of the professional service, or the attorney's conduct falls below any standard of due care' [citation omitted]." *Northrop v. Thorsen*, 46 A.D.3d 780, 782, 848 N.Y.S.2d 304, 308 (2d Dep't 2007).

5.4. Effect of Prior Settlement

Rule:
Plaintiff can maintain a legal malpractice action despite the settlement of an underlying action if the underlying settlement was diminished due to the attorney's negligence.

Authority:
"A legal malpractice cause of action is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel." *Maroulis v. Friedman*, 153 A.D.3d 1250, 1251, 60 N.Y.S.3d 468, 470 (2d Dep't 2017) [internal citations and quotations omitted].

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Mr. McCaffery has received an AV rating from Martindale-Hubbell, their highest rating for general ethical standards and legal ability. He has been named to the New York Metro "Super Lawyers" list for 2016, 2017, and 2018. He has received a 10.0 out of 10.0, "Superb," rating from AVVO.

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